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Minimal Administrative Law. Volume I

Genesis, Evolution and Challenges of Administrative Law

José Ramón Chaves García

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MINIMAL ADMINISTRATIVE LAW

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Volume I. Genesis, Evolution and Challenges of Administrative Law

José Ramón Chaves García

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Minimal Administrative Law. Volume I. Genesis, Evolution and Challenges of Administrative Law

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INTRODUCTION

Every cathedral begins with its foundations. The work entitled “Minimal Administrative Law”, which will be offered in numerous volumes of brief and similar length, must start from the pillars.

In the case of administrative law, a look at the past is indispensable if we are to understand the origin and development of power, and to appreciate the emergence of public law in its threefold use: as an instrument of power for achieving effectiveness; as a tool for securing economic and human resources; and as a limit that safeguards the liberty, equality and fundamental rights of citizens.

A bird’s-eye view is also needed in order to appreciate the models that exist in comparative law, and in particular the duality between the “rule of law” and the “administrative regime”.

Finally, once we know where administrative law comes from, we must make the effort to find out where it is going and, of course, where it ought to go.

This is what this first volume offers, in a tight synthesis, stripped of doctrinal references, speculation and gratuitous erudition. It is, quite simply, a matter of beginning at the beginning of that fascinating journey through the branch of law that intervenes most in our lives, our property and the well-being of us all.

UNIT 1

ORIGINS OF ADMINISTRATIVE LAW

«The history of the reduction of these immunities, of this constant resistance that the Administration has put up against the demand for full judicial review of its acts by carving out exempt and unreviewable enclaves of its own action, is, we may say, in general terms, the very history of Administrative Law (...). It must be said, in any event, that this reduction of immunities cannot be the work of pure and abstract statutory declarations, but must be the result of a whole vast movement of struggle for the Law, in which, naturally, the legislature is not the only party responsible, nor perhaps even the primary one. This is where, above all, the work of the case law comes in, which has already begun, boldly, we must say, though at times also timidly and warily, to draw all the consequences of that splendid Act. It is the duty of all jurists to assist this great work of the case law, to facilitate it and open up paths for it, to encourage it in its forays into territory it has not yet covered, to organise and systematise its isolated findings».

EDUARDO GARCÍA DE ENTERRÍA, *La lucha contra las inmunidades del poder en el Derecho Administrativo* (poderes discrecionales, poderes de gobierno, poderes normativos), *Revista de Administración Pública*, no. 38, 1962.

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I. THE SHADOW OF PUBLIC POWER

1. *Ubi societas, ibi ius publicum*

When do we stop speaking of the people, the clan, the kingdom, the sovereign, the chieftain, and start speaking of the Public Administration? When can the citizen demand a certain way of acting from the public authorities and hold them to account? How many, and what kind of, rules of government must a community have before we can speak of an organisation subject to administrative law? Do Administration and administrative law arise simultaneously, or did the hen come first and then the coop of rules?

The origin of administrative law differs according to times, cultures and peoples, but the purpose is common, since it seeks to ensure the stability of government in the service of public power. Today there are 195 countries recognised by the UN that we may describe as sovereign states, and in all of them there is public law as a regime for the functioning of power, and within it there is always a minimum regime of administrative law. The conditions, the degree to which power is subjected and the corresponding level of guarantees of liberties are another matter, but in all of them there is talk of rules of law.

Within the context of his or her state, every citizen knows how far their claims regarding the functioning of power and its public services may reach and, correspondingly, the public authorities administer their powers without exceeding the boundaries of their intervention in the vital sphere of private individuals.

In every State one may speak of the existence of legal-administrative relations between the administrative public power and citizens, although the two poles of that relationship carry unequal weight and status. The sphere of powers in the case of the State differs from that of subjective rights in the case of the

citizen, just as the legitimacy, force and extent of so-called judicial review differ. In *totalitarian States* administrative power is enormous and the system tolerates only the most meagre levels of rights, with heavy burdens and obligations and a merely formal presence of justice owing to the interference of the executive; in *democratic States*, by contrast, administrative power is healthily balanced by citizens' statutes in which fundamental rights and public liberties are guaranteed, accompanied by judicial review and protection. The unstoppable advance of the *social State* brings with it challenges of service and citizen welfare that require an administrative apparatus alert to demands and diligent in its responses.

This explains why there are elements of administrative law common to the vast majority of legal systems, albeit with their own profile and name; for example, the power of organisation, the sanctioning power, the power of expropriation, the power to contract, the planning power, administrative procedure, foreign administration, defence administration, and so on, are institutions with universal roots. Wherever there is an organised society, there are demands for the protection of liberties and there are public authorities responsible for ensuring peace and the common welfare. The language of those citizens' rights and of those public powers is administrative law.

2. *The oxygen of public power*

The reason for this identity of legal tools in the hands of public power lies in the common ends of that power, or of those who hold it. Public power has a threefold aspiration.

First, a *vocation for existence and visibility*, which requires power to equip itself with a support or pedestal of public institutions.

Second, an aspiration to *legitimacy*, that is, to be recognised as a necessary power, so as not to suffer the erosion of the people questioning its political leadership and expressing their discontent in complaints, protests, disorder and revolts.

And third, an aspiration to effectiveness, that is, to achieve its ends of government, for which it is necessary to have an *organisation structured on rational criteria*. Establishing channels of two-way relations

between Administrations and private individuals involves technical requirements: (i) putting in place differentiated levels of intervention according to subject matter or territory, or rules of hierarchy and competence among the various centres of decision; (ii) designing a procedure that channels the daily management of the flow of applications or requests from private individuals and the responses to them; and finally (iii) establishing channels for complaints or appeals, or mechanisms for rectifying what has been decided, so as to purge the system's errors internally. This simple, broad-brush structure facilitates decision-making and sound decisions in any organised group, and especially in States, where the complexity arising from a dynamic socio-political context, with unavoidable territorial and population factors, demands order in the face of the tendency towards chaos fostered by liberty and autonomy of will, which are the most precious heritage of the human being.

3. Genuine administrative law

The etymology of the word administration comes from Latin; it is formed from the prefix «ad», meaning towards, and «ministratio», meaning subordination or obedience. The etymology gives us the idea that administration consists of a function carried out under the command of another; of a service rendered in the interest and on behalf of another. Therefore, in a very broad and deliberately imprecise sense, one could speak of the existence of public administration wherever public power exists.

In antiquity, great feats, architectural marvels and military campaigns were undertaken that were promoted by those in power and required the organisation of resources. How do we explain the ten thousand warriors of Siam, the pyramids, the Great Wall of China or the Babylonian military campaigns? How could elections and the care of public affairs be organised in the Greek cities? And what of the aqueducts or the Via Appia of imperial Rome?

In those times and civilisations one could speak of organised power but not of administrative law, because to speak of "law" is to speak of power tamed by guarantees, and the "administrative" requires that political forces pursue the service of the general inter-

est. Not power that sustains itself. Nor power that lacks effective channels for the citizen's voice and defence.

That is why, from a modern and scientific perspective, *not every State with administrative law is a State governed by administrative law*. Administrative law as it is conceived and recognised today in advanced democratic States is a legal system with three hallmarks:

- A regime that is exorbitant in relation to private law, in the service of public ends.
- The principle of legality as the reins of administrative power, which it both guides and restrains.
- Judicial review of public power.

The system of administrative law is enriched when it is integrated into the advanced three-dimensional State: the rule of law, the social State and the democratic State (an aspiration embodied in Article 1 of the Spanish Constitution: «Spain is hereby established as a social and democratic State subject to the rule of law»).

Let us now examine, in a tight and superficial synthesis, the legal evolution and the milestones in the origin of the Public Administration, of administrative law and of administrative justice.

II. GENESIS AND DEVELOPMENT

4. Administration and administrative law: can one be understood without the other?

Historians know that the past cannot be examined in the light of the present context, so it would be unrealistic to deny the existence of shoots of administrative law in times when public power did not conform to the concept born after the French Revolution (1789), which raised the principle of legality and that of public accountability as essential features, against the backdrop of the rights of man and of the citizen.

Political power, whether of oligarchic, dictatorial or assembly-based origin, extends its dominion over the things and persons within its ambit and rests on minimal institutions that make it easy to identify who commands, what is commanded and the consequences

for the people of not doing what is commanded. We find ourselves before a fabric of forces and resistances, techniques or institutions, that adorn political power over the community, irrespective of the nature of its legitimacy (force, clan or religion).

One may thus speak of a rudimentary *administrative law* from the moment there exist rules governing the relationship between civilised power and the citizens subject to it. It would be a different matter to speak of the *science of administrative law*, which is born with the modern state and with the emergence of an accountable administration, a discipline whose foundations were raised by the scholarly community in the mid-nineteenth century, originating with the French academics who set themselves the task of studying, with legal method, the legacy and evolution of the French Revolution (Maurice Hauriou and Léon Duguit, from their respective chairs in Toulouse and Bordeaux), and who laid the foundations of an emerging and autonomous legal discipline: (i) by delimiting the reality to be studied; (ii) by applying a rigorous logical-legal and dogmatic method; and (iii) by distilling principles of its own, distinct from those of civil law.

5. *Remote antecedents*

A) *Ancient Egypt: public works*

It is true that in Ancient Egypt (from 3000 BC), with the characteristic features of a theocratic monarchy, the pharaoh assumed supreme command of the organisation of power, headed by the vizier or viziers, who in turn controlled the governors of the provinces.

The viziers reserved for themselves the direction of the treasury, customs, justice and the army, and control of a great bureaucracy that made it possible to manage the construction of public buildings, administer the communal use of land, manage the granaries, control traffic on the Nile, maintain canals and roads, and run the messenger service, in addition to having an advanced system of tax collection. Power left a trace, since everything was recorded before scribes, senior officials with privileges who drew up reports, drafted contracts and evaluated the results of the country's management. Peasants contributed with payments in kind from their harvests and

by providing labour for public works when the fields did not require their attention (the flooding of the Nile), and merchants had their activity regulated and were forbidden from taking part in political affairs.

The success of the great Egyptian public works (pyramids, temples, irrigation, the wall of Memphis, the Nile landing stages, and so on) is explained by the pharaoh's decision to carry them out, usually advised by high priests, he being the spokesman of the general interest, and by the design of a careful hierarchical organisation of human resources, vast public funds and planned management of quarries, transport of stone and organisation of labour, with guaranteed wages and hygiene for the workers.

B) Ancient China: the stability of the bureaucracy

The greatest contribution of ancient China (1600 BC–220 AD) to the administrative world was the bureaucracy, since the management of a vast territory, besieged by foreigners and beset by internal rebellions, required forces of cohesion that were obtained through rigorous recruitment by means of provincial examinations, success in which allowed candidates to climb the rungs of the ladder of power; such examinations dealt with philosophical and literary aptitude and mastery of the texts of Confucius. Their mission was to manage the collection of taxes and the organisation of supplies for the army. Great works of town planning and in the service of agriculture were also undertaken. It had a prestigious diplomatic corps.

The guarantee that the people would face the common task with effort and discipline was offered not by codes or earthly punishments, but by Confucianism and Taoism, which established the moral obligation and responsibility of every citizen to do things as well as possible, with dedication and an ethical sense. As a warning to rulers, Confucius specified that «He who governs must love the people, renew them morally and provide them with the means necessary for daily life».

Ancient China is also cited for the celebrated Constitution of Chow (1000 BC), which contains a breviary of what public law is, providing that «... there are eight factors that the Prime Minister

needs to take into account in governing the different departments of the Administration. The first relates to organisation, so that the government of the State may be established. The second corresponds to functions, so that the government of the State may be understood. The third corresponds to relations, so that the government of the State may be operative. The fourth corresponds to procedures, so that the government of the State may be efficient. The fifth corresponds to formalities, so that the government of the State may be permanent. The sixth relates to control, so that the government of the State may be complete. The seventh corresponds to sanctions, so that the government of the State may be corrected. The eighth corresponds to records, so that the government of the State may be supervised...».

6. *The flowering*

A) *Greece: politics brings administration*

Perhaps the first green shoots of administrative law spring from ancient Greece (1200–146 BC), as the cradle of democracy, in reaction to the oligarchic model. After the dark period came the code of Draco (621 BC), who, despite his bad press, had the merit of making the laws public (engraved in stone), removing them from the arbitrary application of the aristocracy.

Taking as a reference city-states of reduced dimensions, where citizens were freed from labour because they had slaves or foreigners (metics), fostered demands for more representative and populist government. Under Solon (624 BC–560 BC) political rights were granted to all citizens, even the poorest; the popular assembly gave the right to vote to every Athenian who had reached the age of twenty, and there all public officials were elected, including the archons (the eponymous archon, the highest administrative authority; the basileus, the highest religious authority; and the polemarch, the military commander); he also regulated the outward signs of wealth, expropriated large estates and issued numerous decrees or Constitutions, which were engraved on revolving wooden rollers so that all Athenians could read them on the Acropolis.

On these foundations (and after the “soft” tyranny of Pisistratus, who carried out great public works and services for the people) came the advent of democracy in Athens (sixth century), a novel system of government that would mark the future path of legitimacy down to the present day.

At that time, the assessment and variants of the models of government were left to us by a number of philosophers. Thus Plato, in “The Republic”, sets himself up as the champion of positive law: «And so each government establishes laws according to its own convenience: democracy, democratic laws; tyranny, tyrannical ones, and likewise the rest. In establishing them, those who rule show that what is just for the governed is what suits them, and whoever departs from this they punish as a violator of the laws and of justice. Such, my good friend, is what I say is identically just in all cities: what is convenient for the constituted power». His disciple Aristotle goes beyond all faith in rules, affirming, with an inspiration proper to a natural-law thinker, that «A state is better governed by a good man than by good laws».

The birth of Athenian democracy rests on two solid legal pillars: (i) isonomia («the equality of citizens before the law») and (ii) isegoria («equality of speech in the political Assembly, where everyone has the right to speak and to be heard»).

The democratic model entails a significant alteration in the organisation of power, in its action and in its ends, because inevitably the ruler who serves the people wishes their good, and, on receiving the echoes of philosophy, limits his own power.

The Assembly even gave Pericles the green light to create a «salary» (460 BC) that citizens would receive in exchange for devoting themselves to public affairs, favouring the voice of the less well-off and preventing corruption.

Since the Assembly could not remain in permanent session to carry out its will, it delegated executive work to the Council, the Boule, whose composition was representative of the people. The great French historian Gustave Glotz (“The Greek City”, 1928) helps us to discover countless elements with a clear echo in contemporary systems:

— Before taking office, councillors had to swear to exercise their function in accordance with the laws and in the interest of the people, and to keep State affairs secret, while respecting individual liberty.

— The Council was convened by the steering committee (made up of the «prytaneis»), who announced the programme or «agenda» (by heralds or trumpets).

— The steering committee took on the tasks of policing and negotiating with foreign ambassadors, and in case of urgency convened the Council, the Assembly and the strategoi (generals). It issued decrees in the name of the «epistates» (so that he could be held responsible, should the case arise).

— The committee had at least two commissions. On the one hand, the commission for the control of public works, to check their progress and ensure that the treasurer paid the master builders if they did the work correctly. On the other, the maritime supervision commission, which checked the condition of the ships and organised harbour work.

— There were the «logistai», chosen by lot, who were ten commissioners of accounts or «auditors».

— There was a secretary-archivist to draft the decrees and take charge of the publication, classification and safekeeping of official documents («secretary of the Boule»).

— The Boule, in plenary or through the prytaneis, issued executive decrees, without violating laws or mandates of the Assembly, on pain of illegality.

— It supervised subordinates, gave instructions and received reports.

— It was responsible for the maritime administration, given the importance of the fleet for defence and naval trade, and it administered the shipyards and the port of Piraeus: it promulgated administrative regulations; granted honorary decrees to those who fulfilled their undertakings to build the ships promised; authorised repairs to docks, imposed penalties on the administrators of shipyards and arsenals, and checked on the quay the safety conditions and crews of the squadron before it put to sea.

— It administered public property: it awarded contracts for mining concessions, sold State property; leased out sacred lands; after issuing an invoice on expiry of the contract if money was owed, it could carry out confiscations against the defaulter or imprison those in default; it managed the inventory of the sacred treasures; it received tributes from agricultural production on the first fruits of oil and grain; it collected the contribution of the allied cities; it checked the entitlement of the disabled poor who received the daily allowance of two obols, and so on.

— It monitored the progress of public works: it issued the decrees approving the work and awarding it to an architect who drew up the budget, and imposed penalties if execution was delayed or defective (there is a record of a decree promulgated deciding whether the temple of Athena Nike on the Acropolis would have a door of bronze or of gold and ivory, following a report from the architect and taking into account the wages of the artist who would make it).

— It exercised powers of policing and justice. Specifically, it punished breaches of the customs and commercial laws, and guaranteed order at the festivals (Panathenaea, Dionysia, etc.).

To control abuses of power, the sovereign people exercised continuous control over its servants, since anyone could keep an insolent watch over the *bouleutai*, and especially over the senior officials (magistrates) and servants. Senior officials received decrees from the Council, which usually mentioned the sanctions that would be applied to them if they failed to execute them. During the magistrate's term of office, if there were complaints, the Council voted on his management by a show of hands; they confirmed his powers or removed him and sent him to be tried. If his conduct was not confirmed, he could receive no reward for his work. At the end of his mandate, every official had to render accounts (*logos*) before the accounts commission (*logistai*, chosen by lot from within the Council). In the case of simple negligence in the handling of public funds, the guilty official had to restore the sum taken to the treasury; in the case of serious misconduct he was sentenced to repay tenfold. If he was acquitted, he could not be tried again or pursued, by virtue

of the inviolable principle of Attic law of not being accused twice for the same thing («ne bis contra eundem in idem»).

As for the human resources at the service of administrative management, the prytaneis or members of the Council committees lived in the city during their mandate to facilitate the exercise of their powers. Moreover, the vast majority of public offices were filled by lot and for a term of one year (more than a thousand posts), although their work was supplemented by servants who were neither citizens nor free men, but slaves. Offices that required technical knowledge and had to fall to «the best» were excluded. This was the case of the «strategoi», a kind of generals, because war required prestige and experience; of the treasurer, because public funds could not be in just anyone's hands; and of the person in charge of the water supply and the fountains, because no errors could be tolerated in this field.

That said, the lot was drawn among those who put themselves forward voluntarily (anyone without the time or inclination would do a poor job), any citizen could denounce them if they did not do things properly and, above all, they had to render accounts at the end, subject to financial and civil sanctions. A serious business.

We should note that the model described was the one applied in Athens, whereas *the remaining cities of the Greek world went on to apply democratic or oligarchic models, with more or less sophisticated governments and executive apparatuses*, and with greater or lesser attention to services of general interest. For example, education in the Greek states was understood as the training of the citizen, which the State had to guarantee in order to serve the State itself (or rather the city-state); the system ranged from the Spartan model, in which children were taken into public service from the age of seven, to the Athenian model, which granted educational freedom, with a couple of years of military training in adulthood marking entry into the exercise of civil rights; likewise, most city-states paid special attention to guaranteeing public festivals and ceremonies (theatres, gymnasia, and so on) and to maintaining «diplomatic» relations services with the others.

B) Ancient Rome: the emergence of institutions and legal concepts

From the monarchy to the empire, passing through the Republic, Rome witnessed an evolution of public power that progressively advanced towards higher levels of legal certainty.

Over that long period there was a shift from verbal orders to written ones; from individual decisions to collegiate ones; from tasks performed by the army to duties performed by officials; from improvisation in public works and the protection of property towards rational management; from the plurality of languages and the branching of roads towards the spread of Latin and a dense network of communications; and many other changes, because, as size increased, so did complexity, and with the higher degree of civilisation, culture and respect for the law grew. Certainly, Rome did not have a written Constitution, but it did have institutions that had an impact on public life, such as the senate, the praetors or the emperor himself, whose specific weight depended on the particular socio-political context.

Indeed, the Public Administration conceived as a set of administrative institutions at the service of the collective interest, with greater or lesser intensity, may be considered to have become consolidated in the ancient Roman Republic (509 BC–27 BC), and to have been strengthened in the Empire, particularly from the Principate of Augustus onwards.

The sources of law made their way as the will of mighty Rome: the Edicts (issued by magistrates, especially by the praetor), the laws (starting from the primordial Law of the Twelve Tables, continuing with those approved in popular Comitia or plebiscites, and culminating in the edicts of the emperors), or the senatus consulta (decisions of the Senate with the force of law in the Principate).

Rome earned the honour of laying the foundations of private law, but the truth is that it made notable contributions to public law, and within it to administrative law and tax law.

We are speaking of a State that extended territorially from east to west and that required a precise territorial organisation, which led it to create the province with provincial governors in command. In a first stage the provinces were exploited as a source of income and labour, but after Julius

Caesar the provinces became a rational and organised part of the Empire.

It had a bureaucracy of senior offices and honorary magistracies, whose election passed through an electoral administration (*Comitia*) that channelled the written and secret vote, cast in urns. Later, in the Empire, the offices, hierarchies and distribution of competences would increase.

There were offices or magistracies of a distinctly administrative content: the quaestors looked after the public treasury and the collection of taxes; the censors drew up the census and the register for the collection of taxes; the aediles were responsible for urban cleaning and supply, markets, road maintenance and the organisation of public games on fixed dates, and so on.

The *Roman citizen* had a statute of rights and duties of his own, acquired by birth, grant or manumission, and duly registered, distinct from that of the barbarians and separate from that of slaves and freedmen. The citizen held the right to liberty, the right to serve in the militia, the right of suffrage or vote, the right to honours or public office, and even specific rights of a subsidy-like nature such as the free distribution of wheat that the State made to those who could not pay for it (*Cura Annonae*), as well as other unavoidable burdens such as taxes. The Romans proudly proclaimed their status as free, inviolable and privileged men: «*Civis Romanus sum*» («I am a Roman citizen»).

As a complement, *the cities and colonies* gradually received their own statute or regulatory framework, enjoying a certain administrative autonomy (local council) and services of their own (aqueducts, baths, and so on), and in some colonies the citizens even enjoyed exemption from taxes.

And, of course, there was a *statute of public things*, which distinguished between «*res universitatis*» (belonging to the city or public body and used by its members) and «*res communes*», which belonged to humanity (beaches, rivers, and so on). To protect property in public use there were interdicts for recovering it. Private things could be assigned to public use by means of the act of «*publicatio*».

Public works (public buildings, paving of roads, aqueducts, triumphal arches, mines and quarries, and so on) required a declaration of public necessity in order to obtain the land and organise the technical work as well as the human resources (a good part of them taken from the army), and their entrustment under concession.

Public services, albeit in embryonic form, were provided with continuity and guarantees, such as security or sewerage; others at a bare minimum, such as health care or education. Public health services were even provided through the proliferation of baths (the most famous being the Baths of Titus, 81 AD, which allowed every Roman free hot baths).

Nor were *contracts and concessions* lacking, with the conditions of contracting announced and awards made by auction, or at discretion.

A typical case was the awarding of tax collection for a lump sum, so that the collector kept the surplus. Likewise, public works and services were entrusted by auction to the bidder offering the lowest prices (aqueducts, baths, supplies to the army, fire-fighting, and so on). Such juicy revenues were not free from corruption (the case of Licinius Crassus, who held the monopoly of the fire service in Rome, whose water-laden cart put out fires subject to prior payment of the fee). These lessees of public services were referred to in the Bible as publicans (from «publicum», in the sense of a State monopoly); the abuses of office by tax collectors and public works concessionaires came to an end when Julius Caesar created a permanent fiscal corps (45 BC), in addition to reserving to himself supreme jurisdiction over disputes.

There was even an added task of *promotion*, deriving from the *pax romana*, expressed in encouraging the cultivation of cereals and vines, or in organising circus games, in the context of an extensive network of internal communication routes, safety at sea freed from piracy, and tax incentives for settlers to establish themselves in the new lands.

Policing activity and regulation focused on guaranteeing public safety and social peace, with day and night police services, and

there were magistracies with urban competences and especially for ensuring the supply of provisions or the control of smuggling.

As regards the regulation of activities, it reached its highest levels of intervention with the famous Decree of Diocletian, the «Edict on Maximum Prices» (301 AD), which regulated the prices of goods and the wages of workers.

This intense administrative intervention explained the need for a financial administration with a flow of income and expenditure, and a tax administration to collect revenue, keeping simple public accounts.

Finally, *tax law* gained great impetus, around technical institutions such as the Treasury (aerarium) and the Fisc (fiscus), and with the establishment of direct and indirect taxes, land being taxed under principles of proportionality, with fraud and embezzlement kept under control.

In short, one may speak of a Roman administrative law made up of provisions of varied origin, which regulated relations between public affairs and citizens, although one could never speak of effective control of government, but rather of a diffuse, informal control, more often than not of a political nature.

7. *The dark period of the Middle Ages*

The Middle Ages (from the fifth century until well into the fifteenth) represent a period in which there is no idea of State or of sovereignty, but rather a model of balance of forces in which positive law is weakened both in existence and in force. The Early Middle Ages witness the written reception of barbarian customary rules, until the Late Middle Ages take on the rebirth of Roman jurisprudence.

There is no State but fiefdoms, and no higher rule than the will of the prince, king or emperor. Tensions between the nobility and oligarchs and the kings will push the latter to accept the role of supreme social arbiter, alongside that of lord who reserved to himself the monopoly of military force. The historic milestone of such pacts with the nobility was provided by the Magna Carta of 1215, in which King John of England granted privileges and guarantees to the lords (notably habeas corpus, to guarantee personal liberty

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